

Public Records Act Training

Office of the
California Attorney General

California Constitution, Article 1, Section 3, Subdivision B

- ❖ Constitutional amendment added by Proposition 59
- ❖ Provides generalized right of access to be implemented by statute
- ❖ Statutes that provide access are to be liberally construed

California Constitution, Article 1, Section 3, Subdivision B

- ❖ Statutes that restrict access are to be narrowly construed
- ❖ Legislature must make findings justifying the need for new statutory provisions that restrict access

California Constitution, Article 1, Section 3, Subdivision B

❖ Constitutional provision expressly preserves:

- constitutional provisions or statutes restricting access that were in existence at the time.

California Constitution, Article 1, Section 3, Subdivision B

- ❖ Constitutional provision expressly preserves:
 - individual rights of privacy.
 - the rights of due process and equal protection of the laws.

Applicable Statutes

❖ Public Records Act (PRA), Government Code section 6250-6276.48

- Provides public access to state and local government records.

Applicable Statutes

❖ Legislative Open Records Act, Government Code section 9070-9080

- Provides public access to records of the Legislature.

Applicable Statutes

❖ Judicial records

- Case law provides access to judicial records.

Applicable Statutes

❖ Freedom of Information Act (FOIA), 5 U.S.C. Section 552

- Provides public access to records of the federal government.

Applicable Statutes

❖ If records are mistakenly sought under FOIA, California agency should:

- explain that FOIA covers federal government records.
- explain that PRA covers California government records.
- provide records in accordance with PRA.

Applicable Statutes

❖ Information Practices Act (IPA) vs. Public Records Act (PRA)

— IPA

- Applies only to state government records
- Provides confidentiality for all records containing personal information

Applicable Statutes

❖ Information Practices Act (IPA) vs. Public Records Act (PRA)

— IPA

- Personal information includes: name, address, identifying numbers (such as SSN.), etc.

Applicable Statutes

❖ Information Practices Act (IPA) vs. Public Records Act (PRA)

— PRA

- All government records are disclosable unless specifically made exempt
- Applies to state and local government records

Applicable Statutes

- ❖ Information Practices Act (IPA) vs. Public Records Act (PRA)

- How to reconcile these conflicting laws?

- IPA contains exemption for all records disclosed under PRA.
- Therefore, IPA does not shield records from disclosure that are otherwise disclosable under the PRA.

Applicable Statutes

❖ Information Practices Act (IPA) vs. Public Records Act (PRA)

- Records that are exempt from disclosure to public under the PRA may be accessible to the subject of the records under the IPA.

Public Records Act: Purposes

- ❖ Access to information about the conduct of the public's business is a fundamental and necessary right of every person in the state
- ❖ In providing access, PRA remains mindful of individual privacy rights

Public Records Act: Purposes

- ❖ Access permits public to monitor governmental activities
- ❖ Agency cannot deny access to disclosable records based on requester's intended usage

Public Records Act: Definitions

❖ Public record defined:

- Any writing that is owned, used or retained by a government agency in the conduct of its official business.

Public Records Act: Definitions

❖ Writing defined:

- Any means of recording information including paper, audio tape, video tape, compact disc, DVD, computer diskette, computer hard drive, etc.

Public Records Act: Definitions

❖ E-mail is expressly covered.

Issues:

- When is email no longer a record?
- When you place it in the trash?
- When it leaves your hard drive?
- When it is erased from the agency's back-up tape?

Public Records Act: Definitions

- ❖ During discovery in litigation, agency may be required to recover email from back-up tapes
- ❖ At present, there are no cases or opinions regarding retrieval of email trash under the PRA. PRA and litigation serve very different purposes. Based on the purposes of the PRA as discussed in *Rogers v. Superior Court* (1993) 19 Cal.App.4th 469, it seems unlikely that agencies would be asked to retrieve records from back-up tapes under the PRA.

Making A Request

- ❖ If agency were required to extract information from back-up tapes under PRA, full cost recovery likely (see subsequent discussion of costs.)

Making A Request

- ❖ Request may be made orally or in writing
- ❖ Recommend that agency confirm oral requests in writing
- ❖ Written requests facilitate agency compliance by reducing confusion about the records requested and permitting agency to track the request

Making A Request

- ❖ Request need not identify an exact record
- ❖ Request may identify records by their general content

Making A Request

- ❖ Request must still be sufficiently precise to permit the agency to locate the records
- ❖ Request should not be unduly burdensome

Making A Request

- ❖ Request should be specific and focused (*Rogers v. Superior Court* (1993) 19 Cal.App.4th 469.)
- ❖ Specific and focused requests facilitate prompt disclosure by government

Making A Request

❖ Open ended requests:

- Are burdensome
- Frustrate agency
- Are expensive for requester
- May lead to non-compliance

Making A Request

- ❖ When a request is not specific and focused, the agency has a duty to assist the public in focusing the request
 - Assist in identifying requested information
 - Describe physical location of the record

Making A Request

- ❖ When a request is not specific and focused, the agency has a duty to assist the public in focusing the request
 - Describe technology in which the record is housed
 - Help public to overcome any practical barriers to access

Agency Duty To Search

- ❖ Agency must make reasonable efforts to locate requested records. At a minimum, such efforts should include:
 - consulting record indexes
 - consulting knowledgeable people
 - looking in logical places

Agency Duty To Search

- ❖ Special rule for electronic records
- ❖ Record must be provided in electronic format used by the agency if requested
- ❖ Software developed by the government is not disclosable
- ❖ Commercial software is not disclosable
- ❖ Data housed in protected software may still be disclosable

Inspection Of Records

❖ General Rule

- Agency records may be inspected at any time during regular office hours

Inspection Of Records

- ❖ In reality, the agency may need to:
 - locate the requested records
 - gather multiple records for inspection
 - redact exempt information prior to inspection
- ❖ Appointment to inspect records may be necessary under these circumstances

Requesting Copies Of Records

- ❖ Agency should provide records promptly
- ❖ Agency has up to 10 days to:
 - determine if it will comply with the request, and
 - notify the requester of its determination.

Requesting Copies Of Records

- ❖ Agency may extend period to make this determination for up to 14 days if there is a need to:
 - communicate with field offices
 - examine voluminous records

Requesting Copies Of Records

- ❖ Agency may extend period to make this determination for up to 14 days if there is a need to:
 - communicate with others who have an interest in the records.
 - construct computer reports.

Requesting Copies Of Records

- ❖ Once the determination to comply with the request has been made, the agency has a reasonable period of time to provide the records
- ❖ Remember that records must be provided promptly

Requesting Copies Of Records

- ❖ If the agency cannot provide the records during the time for making a determination, it must provide a good faith estimate of when the copies will be available

Fees For Duplication Of Records

- ❖ Agency may charge the direct cost of duplication
 - Direct cost includes:
 - pro-rata cost of duplication equipment
 - pro-rata cost of equipment operator (salary and benefits)
- ❖ DOJ charges \$.10/ per page

Fees For Duplication Of Records

- ❖ Agency may charge the direct cost of duplication

- Direct costs do not include:

- research
- retrieval
- redaction

Fees For Duplication Of Records

Issue: What, if any, are the “direct costs of duplication” associated with faxing or e-mailing a record to a requester?

Fees For Duplication Of Records

- ❖ Special rules for electronic records
 - Agency may recover full costs where agency is required to:
 - extract or compile data
 - undertake programming to produce data

Fees For Duplication Of Records

- ❖ Special rules for electronic records
 - What does it mean to extract or compile data for purposes of this section?
 - Full cost recovery probably not available for merely extracting or compiling information loaded in extractable fields in a data base such as an Excel spreadsheet.

Fees For Duplication Of Records

- ❖ Special rules for electronic records

- Some requesters contend that they can require agencies to create new records through extraction, compilation or programming even if the agency would otherwise have no need to create the record. We doubt that this is the correct interpretation of the special cost provision for electronic records.

Withholding Records

- ❖ Exemptions are generally discretionary, not mandatory
- ❖ Generally, the agency may redact exempt information; remainder of record must be disclosed
- ❖ Where exemptions render the entire record worthless, the entire record may be withheld

Withholding Records

- ❖ Agencies should consider disclosure issues in designing records
- ❖ Exempt and disclosable information segregated from one another so that a clerk can duplicate disclosable information without need for further review by an attorney or other agency personnel

Withholding Records

- ❖ Agencies need not provide privilege or exemption log of exempt records
- ❖ Agencies should provide a sufficient explanation of the reasons for withholding records so that the public can decide whether to challenge the agency's withholding

Withholding Records

- ❖ If exempt information is disclosed, the exemption is waived
- ❖ The following disclosures are not waivers:
 - Disclosures pursuant to the Information Practices Act
 - Disclosures made pursuant to discovery requests

Withholding Records

- ❖ The following disclosures are not waivers:
 - Disclosures made pursuant to court order
 - Disclosures to another government agency when there is a confidentiality agreement and the head of the agency designates those employees who are permitted to examine the records

Withholding Records

❖ Source of Exemptions

- Expressly provided in Gov. Code, § 6254
- Imported into section 6254, subd. (k) from other provisions of state or federal law
- Public interest balancing test under section 6255

Litigation and Legal Advice Exemptions

- ❖ Pending litigation (Gov. Code, § 6254 (b))
 - Exempts records prepared for use in litigation
 - Exemption lasts only for duration of litigation

Litigation and Legal Advice Exemptions

- ❖ Pending litigation (Gov. Code, § 6254 (b))
 - Settlement itself is disclosable
 - Depositions are disclosable

Litigation and Legal Advice Exemptions

- ❖ Attorney-client privilege (Evid. Code, § 954 imported into PRA via Gov. Code, § 6254 (k))
 - Protects confidential communications between attorney and client
 - Exemption is permanent

Litigation and Legal Advice Exemptions

- ❖ Attorney-client privilege (Evid. Code, § 954 imported into PRA via Gov. Code, § 6254 (k))

- Although public disclosure generally waives the privilege, disclosure to opposing party for purpose of advancing negotiations does not constitute waiver (*STI Outdoor v. Superior Court* (2001) 91 Cal.App.4th 334, 341.)

Litigation and Legal Advice Exemptions

- ❖ Attorney work product (Code Civ. Proc., § 2018.30 imported into PRA via Gov. Code, § 6254 (k))
 - Protects impressions and conclusions of attorney
 - Exemption is permanent
 - Applies to legal advice in litigation and nonlitigation contexts

Litigation and Legal Advice Exemptions

- ❖ Evid. Code, § 1040 imported into PRA via Gov. Code, § 6254 (k)
 - Protects confidential information when in public interest to do so
 - Often duplicative of public interest balancing test under Gov. Code, § 6255

Litigation and Legal Advice Exemptions

- ❖ Evid. Code, § 1040 imported into PRA via Gov. Code, § 6254 (k)
 - PRA exemptions in the context of discovery
 - Litigants may make requests before or during litigation

Litigation and Legal Advice Exemptions

- ❖ Evid. Code, § 1040 imported into PRA via Gov. Code, § 6254 (k)
 - If agency believes PRA request violates discovery order, agency should use collateral estoppel to defeat the request
 - Agencies may not use PRA exemptions to defeat discovery requests; must use Evid. Code, § 1040

Exemption For Personnel Records— Gov. Code, § 6254, Subd. C

- ❖ Exemption applies to personnel, medical or similar records whose disclosure would constitute an unwarranted invasion of personal privacy
- ❖ Usually involves personal information required by employer

Exemption For Personnel Records— Gov. Code, § 6254, Subd. C

- ❖ Exemption generally does not cover information that would be exchanged at a cocktail party, such as educational background, employment background and training
- ❖ Personnel records are defined by content, not by location

Exemption For Personnel Records— Gov. Code, § 6254, Subd. C

- ❖ Performance evaluations are exempt from disclosure
- ❖ Case law is unsettled regarding when disclosure of personnel actions are required to be disclosed:

Exemption For Personnel Records— Gov. Code, § 6254, Subd. C

- Court required disclosure if there were substantial evidence of wrongdoing irrespective of outcome; nondisclosable only if charges found to be groundless (*AFSCME v. Regents of University of California* (1978) 80 Cal.App.3d 913; and *Bakersfield City School District v. Superior Court* (2004) 118 Cal.App.4th 1041.)

Exemption For Personnel Records— Gov. Code, § 6254, Subd. C

- Where agency publicized personnel action to deter similar conduct, court found that personnel action was nondisclosable unless there were a compelling governmental justification (*Payton v. City of Santa Clara* (1982) 132 Cal.App.3d 152.)

Exemption For Personnel Records— Gov. Code, § 6254, Subd. C

- When an agency files a personnel action with the State Personnel Board, the filing is a disclosable public record unless it involves a peace officer (*Copley Press, Inc. v. Superior Court of San Diego County* (2006) 39 Cal.4th 1272, held that the county civil service commission's files of peace officer disciplinary actions are confidential records of the “employing agency” within the meaning of Pen. Code, §§ 832.7 and 832.8.)

Exemption For Investigatory Records – Gov. Code, § 6254, Subd. F

- ❖ Protects complaints to, and investigatory, intelligence and security records of, the Attorney General
- ❖ Protects investigatory records used for law enforcement, licensing or correctional purposes
 - Law enforcement purposes refers to traditional criminal law enforcement

Exemption For Investigatory Records – Gov. Code, § 6254, Subd. F

- ❖ Protects records indefinitely
- ❖ Exemption protects entire record; redaction not necessary
- ❖ Certain affirmative disclosures must be made in connection with arrest and investigations of public requests for assistance

Exemption For Investigatory Records – Gov. Code, § 6254, Subd. F

- ❖ Agencies with non-licensing administrative authority must use public interest balancing test to protect investigative records; they cannot invoke the investigatory exemption of section 6254(f)
- ❖ Public interest in nondisclosure is strongest during pendency of investigation

Public Interest Balancing Test – Gov. Code, § 6255

- ❖ Protects records where the public interest in nondisclosure clearly outweighs the public interest in disclosure
- ❖ Public interest in nondisclosure does not refer to the administrative convenience of a public agency, but to the broader interests of the public in general

Public Interest Balancing Test – Gov. Code, § 6255

- ❖ *San Jose v. Superior Court* (1999) 74 Cal.App.4th 1008, outlines the three-step test for the public interest balancing test:
 - The public interest in disclosure
 - The public interest in nondisclosure
 - Less intrusive alternatives to satisfy the public interest in disclosure

Public Interest Balancing Test – Gov. Code, § 6255

- ❖ In *San Jose*, the press requested copies of citizen complaints about airport noise.
 - Public interest in disclosure:
 - Monitor the governmental response to these complaints

Public Interest Balancing Test – Gov. Code, § 6255

- Public interest in nondisclosure:
 - Disclosure intrudes upon complainant privacy
 - Chilling effect on citizen complaints

Public Interest Balancing Test – Gov. Code, § 6255

- Less burdensome alternatives:
 - Press can attend city council meetings in which noise complaints were discussed
 - Press can contact interest groups involved in both sides of the airport noise debate
 - Press can visit affected neighborhoods

Public Interest Balancing Test – Gov. Code, § 6255

- ❖ Court concluded that city was justified in withholding names of complainants.
- ❖ Remember– the agency bears the burden of demonstrating that the public interest is best served by maintaining the confidentiality of the records.

Public Interest Balancing Test – Gov. Code, § 6255

- ❖ Any state agency (other than constitutional officers) that wishes to assert the public interest balancing test must first receive approval from the Governor's Legal Affairs Secretary

Deliberations, Correspondence, And Drafts

❖ Deliberative process privilege

- Protects records involved in the decision-making process
- Implemented through public interest balancing test in Gov. Code, § 6255
- Permits candid debate and airing of potential solutions

Deliberations, Correspondence, And Drafts

- ❖ Deliberative process privilege

- Focuses on recommendatory speech not facts
- Sometimes facts are inextricably intertwined with recommendatory speech and thus are exempt as well

Deliberations, Correspondence, And Drafts

❖ Deliberative process privilege

- Advisors may be from inside or outside the government
- Deliberative process privilege may be overcome by a narrow request with high public interest

Deliberations, Correspondence, And Drafts

❖ Correspondence Exemptions

- Only the Governor and the Legislature have correspondence exemptions
- Correspondence means letters from persons outside the government

Deliberations, Correspondence, And Drafts

❖ Correspondence Exemptions

- Governor's action requests and budget change proposals would be protected by the deliberative process privilege not the correspondence exemption
- Some agencies use the balancing test to protect the names and addresses of persons who write the agency

Deliberations, Correspondence, And Drafts

- ❖ Drafts, notes and memoranda (Gov. Code, § 6254 (a))
 - Protects preliminary drafts, notes and memoranda that are not retained in the ordinary course of business where the public interest in nondisclosure outweighs the public interest in disclosure

Deliberations, Correspondence, And Drafts

- ❖ Drafts, notes and memoranda (Gov. Code, § 6254 (a))
 - Difficult test to understand and apply (*Citizens for a Better Environment v. California Department of Food and Agriculture* (1985) 171 Cal.App.3d 704.)
- ❖ Deliberative process privilege exemption is easier to understand and apply

Copyright and Trade Secrets

❖ Copyright

- Federal agencies excluded from federal copyright protection, but
- States are not expressly excluded
- Copyright protection presumably imported into PRA via Gov. Code, § 6254 (k)

Copyright and Trade Secrets

❖ Copyright

- Gov. Code, § 6254.9 (software developed by government) implicitly endorses copyright protection for California government records

Copyright and Trade Secrets

❖ Copyright

- *County of Suffolk v. First American Real Estate Solutions* (2001) 261 F.3d 179, required disclosure of copyrighted government mapping data but prohibited the requester from distributing the information

Copyright and Trade Secrets

❖ Copyright

- This approach balanced disclosure under New York Public Records Act and copyright protection

Copyright and Trade Secrets

❖ Trade Secrets

- Trade secrets not expressly exempt
- However, the confidentiality of trade secrets is protected by Evid. Code, § 1060, and is imported into the PRA via Gov. Code, § 6254(k)

Copyright and Trade Secrets

❖ Trade Secrets

- Section 3426.1 of the Civil Code states that “trade secret,” for purposes of the PRA, is defined by the definition that was in use in 1984. One must look to case law and the Restatement of Torts to determine the definition.

Copyright and Trade Secrets

❖ Trade Secrets

- Agency must determine whether records submitted to it are protected by trade secret
- If not protected, agency must disclose
- Agency may wish to withhold for limited period in order for holder of right to seek protection in court

Enforcement

- ❖ Mandate, injunctive relief, declaratory relief
- ❖ If plaintiff prevails, plaintiff receives court costs and attorney's fees
- ❖ Plaintiff prevails if suit motivates disclosure

Enforcement

- ❖ Once suit is filed, any voluntary disclosure by agency means plaintiff has prevailed
- ❖ Plaintiff need not prevail on all issues; one issue is probably sufficient
- ❖ Agency receives fees only if suit is adjudged totally frivolous

Where To Get More Information

- ❖ Summary of the California Public Records Act 2004
http://ag.ca.gov/publications/summary_public_records_act.pdf
- ❖ Guidelines For Access to Department of Justice Public Records
<http://ag.ca.gov/consumers/general/pr.php>